Supreme Court, U.S.
FILED

931153 JAN 18 1994

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No.

In The

Supreme Court of the United States

October Term, 1993

JERRY N. MIXON, M.D.,

Petitioner,

v.

FRANKLIN COUNTY, STATE OF IDAHO, et al.,

Respondents.

Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED FOR REVIEW

In this case, adverse rulings to the Petitioner were rendered by the United States District Court for the District of Idaho on October 31, 1990, but the clerk of the court failed to provide notice of the entry of such rulings to Petitioner or his counsel in violation of Rule 77(d), FRCP. Upon timely inquiry by Petitioner's counsel as to the status of pending motions, this error was discovered. The district court, sua sponte, and before Petitioner's counsel could file a motion seeking relief from said judgment, entered an order on January 9, 1991, vacating the ruling of October 31, 1990, and reentering the same effective January 10, 1991, in order to permit Petitioner to timely appeal. The relief was premised upon Rule 60(a), FRCP, and Rule 4(a)(5), FRAP. Upon appeal, an initial motions panel of the United States Court of Appeals for the Ninth Circuit dismissed Petitioner's original appeal as untimely and, *in dicta*, held that "evidence" did not support a finding of due diligence of Appellants' counsel under Rule 60(b), FRCP, sufficient to permit Petitioner relief from judgment. Thereafter, Petitioner returned to the district court and filed a Rule 60(b) motion, seeking relief from judgment and the opportunity to appeal, which motion was granted by the district court. Upon subsequent timely appeal by the Petitioner, a separate panel of the Ninth Circuit ruled that the decision by the first panel concerning the issue of due diligence, even though dicta and made without a Rule 60(b) motion having ever been filed, was the "law of the case", prohibiting further appeal and consideration on

QUESTIONS PRESENTED FOR REVIEW – Continued

the merits. As a result of the foregoing, the Petitioner respectfully suggests that the following questions are presented for review:

1. Whether the "law of the case" doctrine applies to decisions of a motions panel when the decision of such panel on the question of entitlement to Rule 60(b) relief is dicta and made without any such motion having ever been presented to or considered by the district court.

2. Whether the district court has the power and duty to consider entitlement to Rule 60(b) relief following such a ruling by the motions panel.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, were:

1. Petitioner, Jerry N. Mixon, M.D., Appellant in the Court of Appeals;

2. The following Respondents/Appellees in the Court of Appeals:

a. Franklin County, State of Idaho;

b. Eudean Gunnell, individually and in his official capacity as Franklin County Sheriff;

c. Gary Schvaneveldt, individually and in his official capacity as Franklin County Deputy Sheriff;

d. Marc Haws, individually and in his official capacity as Idaho Deputy Attorney General;

e. The State of Idaho, Department of Law Enforcement;

f. John Olmstead, individually and in his official capacity as an investigator for the Idaho Department of Law Enforcement;

g. Scott Birch, individually and in his official capacity as an investigator for the Idaho Department of Law Enforcement;

h. TWI, Inc., an Idaho corporation; and

i. Robert G. Mangini, an individual.

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Petition for a Writ of Certiorari
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For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner respectfully prays that a writ of certiorari be issued to review the unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit, entered in this matter on September 13, 1993.

OPINIONS BELOW

The unpublished memorandum decision of the Ninth Circuit Court of Appeals issued in support of its judgment is not reported in the Federal Reporter series, but is reprinted in the Appendix to this petition as Exhibit D

therein. Also contained in the Appendix as Exhibit E is the order of the Ninth Circuit denying the Petitioner's request for rehearing and rejecting the suggestion for rehearing en banc.

JURISDICTION

The Court of Appeals entered its order denying and rejecting the petition for rehearing and suggestion for rehearing en banc on October 20, 1993. This petition is therefore timely under this court's Rule 13.4. This court has discretion to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case does not involve the application or interpretation of constitutional or statutory provisions per se, but rather involves the question of the application and interpretation of a judicially-created rule or policy known as the "law of the case" doctrine. The application of that doctrine in this case has effectively precluded review of the merits of Petitioner's appeal in the Ninth Circuit and deprived him of his opportunity for a full and fair appellate hearing.

STATEMENT OF THE CASE

This case has a long and storied history that requires abbreviated review. In 1987 and 1988, Dr. Jerry Mixon, a licensed physician, and his wife initiated two civil actions against, inter alia, county and state law enforcement officials, county prosecutors, an Idaho deputy attorney general, a county hospital and private arson investigators and their insurance company employer. The gravamen of these complaints was that because of Dr. Mixon's advocacy for patient safety at the county hospital and his involvement in bringing to light known malpractice by an established hospital staff physician, he was denied hospital staff privileges and positions in retaliation for his advocacy and caused to suffer a decline in his medical profession. Dr. Mixon and his family moved from Idaho to Washington because of these events, but continued to press tort claims and civil litigation against these parties. Shortly after leaving the community, the Mixon's Idaho residence was burned to the ground. An arson investigation by many of the above parties ensued and Dr. Mixon was frivolously charged with arson and insurance fraud. These charges were dismissed as unfounded following a preliminary hearing, and after Petitioner rejected the prosecutor's offer to dismiss the criminal charges if Petitioner would drop his civil tort claims against the county and state officials, the hospital and its agents. These Section 1983 actions followed, asserting that the various defendants had engaged in a conspiracy to violate his civil rights, subjecting him to the deprivation of his medical practice and to false accusations of criminal conduct.

Years of discovery and motion hearings followed in the district court. After numerous hearings, the district court granted dismissal or summary judgment to law enforcement defendants, principally on grounds related to absolute or qualified immunity. Many of said decisions were clearly erroneous and contrary to existing Ninth Circuit or Supreme Court precedent. The Mixons (in the trial court, Dr. Mixon's former spouse was a party plaintiff) sought Rule 54(b) certification to appeal these decisions as to these defendants, which was granted. The Mixons also submitted Rule 59(e) motions to alter or amend as to the law enforcement defendants. These motions were all pending while simultaneously other motions, discovery, settlement and related issues and litigation were pursued by the parties. Judgment was ultimately entered against the hospital defendants.

In the interim, on October 31, 1990, the district court granted various defendants in this case summary judgment and denied the Mixons' Rule 59 motion to alter or amend or reconsider its prior rulings in favor of other defendants. This memorandum decision and judgment triggered the time clock for the Mixons to appeal, pursuant to a prior certification under Rule 54(b), FRCP. However, this memorandum decision and judgment was not served by the clerk of the court on, inter alia, counsel for the Mixons, in violation of Rule 77(d), FRCP, and as a result, the Mixons and their counsel were unaware of the entry of this decision. Mixons' counsel contacted the court clerk regarding the status of the motion to alter or amend within 54 days after the matter was at issue (December 24, 1990). The clerk was to check the files and advise of the status. This did not occur until January 9,

1991, when counsel's inquiry prompted discovery of the clerk's error. Immediately upon learning of this error on January 9, 1991, the district court, sua sponte, and before the Mixons could seek relief from the judgment under Rule 60(b), entered an ex parte order under the authority of Rule 60(a), FRCP, and Rule 4(a)(5), FRAP, reentering the October 31, 1990, judgment and order as of January 10, 1991, and authorizing the Mixons the opportunity to appeal, which they timely did.

Subsequently, respondents herein filed motions to dismiss this appeal which were assigned to a motions panel. The motions panel determined that the district court had erred in relying upon Rules 60(a), FRCP, and Rule 4(a)(5), FRAP, in its determination to grant relief from the judgment. However, even though no Rule 60(b) motion had been filed by the Mixons, heard by the district court nor evidence presented in that court concerning entitlement to such relief, the motions panel concluded in its final paragraph:

> "Finally, the evidence does not support the district court's finding that appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' Sept. 5, 1990 motion to amend judgment. Thus, under the test set forth in *Rogers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), appellants were not entitled to relief under Rule 60(b)."

This decision was wholly dicta and made without the benefit of a trial court review of any Rule 60(b) motion, without a complete factual record and further misstated the ruling of the district court.

The Mixons sought rehearing and rehearing en banc, which were denied and rejected without opinion. Since there had been no pending Rule 60(b) motion previously made or ruled upon, the Mixons returned to the district court and timely filed such a motion, supported by new evidence unknown to the motions panel, including affidavits of Mixons' counsel and his deposition, which established a full factual record for a decision on Rule 60(b) relief. The district court, after hearing, argument and review of this new evidence, granted the Mixons Rule 60(b) relief by memorandum decision on December 23, 1991, and the Mixons timely appealed to the Ninth Circuit. The defendants filed renewed motions to dismiss before the Ninth Circuit, which were initially denied by a second motions panel of that court on May 29, 1992. On September 13, 1993, without ever addressing the new evidence submitted to the district court nor the basis of the district court's grant of Rule 60(b) relief and without ever having reached the merits of these appeals, a new panel of the Ninth Circuit reversed the granting of Rule 60(b) relief on the sole grounds that the first motions panel ruling of July 17, 1991, was the "law of the case" and precluded Rule 60(b) relief. The Mixons again sought rehearing or rehearing en banc and the same were denied and rejected by the Ninth Circuit on October 20, 1993.

ARGUMENT FOR ALLOWANCE OF WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF THE PROPER PARAMETERS OF THE LAW OF THE CASE DOCTRINE

A. INTRODUCTION

A travesty of judicial review has occurred in this case. Dr. Mixon was initially precluded by erroneous rulings of the district court from obtaining a trial on the merits of his civil rights claims. The clerk of the district court compounded this error by failing to provide Dr. Mixon with the notice required by Rule 77(d), FRCP, of the entry of this decision. Dr. Mixon's counsel sought to determine the status of his case within a brief period of time and caused this error to be brought to the attention of the district court. On January 9, 1991, the district court, immediately upon discovery of the same, entered a sua sponte order acknowledging the existence of the good faith and due diligence of Dr. Mixon's counsel through the three years of extensive litigation, but further compounded the error in these cases by granting Dr. Mixon relief, by premising the same incorrectly upon Rules 60(a), FRCP, and Rule 4(a)(5), FRAP. Upon initial appeal, a Ninth Circuit motions panel granted a motion to dismiss by various defendants even though they had made no objection in the district court, but further compounded the prior errors by ruling, in clear dicta, without any factual basis and with no Rule 60(b) motion having ever been filed or considered by the district court, that Dr. Mixon was likely not entitled to relief under Rule 60(b).

To create a proper record, Dr. Mixon returned to the district court and filed a Rule 60(b) motion providing evidence of what had transpired and his contacts with the clerk of the court and after a full hearing, the district court granted relief. Upon the second appeal, a new panel of the Ninth Circuit completed the travesty of justice in this case by dismissing the appeal, holding that the law of the case doctrine precluded any review on the merits because of the dismissal by the first panel, even though such dismissal may have been done erroneously.

If Lewis Carroll or Franz Kafka had written this tale, it might have been viewed as startling fiction. Since this fiction is however real and has been authored by justices and clerks of the federal court system, it must be viewed for what it truly is – a tragic preclusion of the fundamental right of judicial review by the nonsensical and wooden application of an inapplicable and misplaced legal doctrine. And we wonder why the American public has such a jaundiced view of the justice system and the courts.

B. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY TO DICTA RULINGS

Initially, it must be pointed out that the motions panel ruling of July 17, 1991, on the issue of entitlement to Rule 60(b) relief is purely, totally and unequivocally dicta and should not be entitled to any binding or precedential effect. That motions panel did not have before it a ruling by the district court on a Rule 60(b) motion. Rather, that panel merely had an ex parte ruling from the district court that the Mixons were entitled to relief under

Rule 60(a), FRCP, and Rule 4(a)(5), FRAP. No hearing had been conducted by the trial court nor evidence presented to it concerning Rule 60(b) considerations. As a result, in the absence of these issues having been raised and decided by the district court upon a full and complete factual record, the motions panel of the Ninth Circuit was without authority to render an abstract or advisory declaration that the Mixons were not entitled to Rule 60(b) relief. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 57 L.Ed.2d 1073, 98 S.Ct. 3026 (1978). At best, therefore, this determination or ruling is nothing more than dicta by that panel and dicta is never entitled to stare decisis effect. *Gabbs Exploration Co. v. Udall*, 315 F.2d 37 (1963), cert.den., 375 U.S. 822, 11 L.Ed.2d 56, 84 S.Ct. 61. See also, *Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557, 1571-72 (S.D. Fla.1991), holding that dicta in an appellate decision could not constitute binding law of the case precedent, and *Combs v. United States*, 768 F.Supp. 584, 587 (E.D.Ky.1991), noting that issues not properly raised or decided by the district court initially cannot form the basis for law of the case adjudication:

> "The doctrine of law of the case relates to issues of law decided at an earlier stage of the litigation. Only such issues that have actually been decided, either explicitly or by necessary inference from the disposition, constitute the law of the case. 1B J. Moore, J. Lucas & T. Currier, Moore's Fed. Prac. 0.404[1](1988). Thus, points of law not reached and decided in the first appeal remain open on remand. Id. 'In the case in which a mandate of the appellate court does not address a particular issue, the appellate judgment, on this issue, does not establish the law of the case . . . ' Id. at 0.404[4.-3].

> The court has reviewed this matter and does not find that the law of the case doctrine bars consideration of the other two issues raised by the United States in its earlier motion to dismiss. First, Judge Reed never spoke to the merits of these issues in his opinion. Judge Reed only dismissed the case based upon his conclusion that Hall was not acting within the scope of his employment with the United States as a matter of Kentucky law at the time of the accident. Second, because Judge Reed only dismissed the case on this sole ground, the Plaintiffs could only appeal the decision to the extent that it was adverse to the Plaintiffs; they did not have a foundation for appealing any other issues since they were not used as a basis for dismissing the case in Judge Reed's order and judgment.
>
> . . . .
>
> Thus, the issues were never properly before the Sixth Circuit since the district court had not first considered those matters, even though the parties attempted to stimulate a discussion of the issues and to solicit direction from the Court of Appeals in their briefs. Nonetheless, the Sixth Circuit limited its appellate review to the only issue technically raised by Judge Reed's opinion dismissing the case. This court finds, therefore, that the law of the case doctrine does not foreclose consideration of these issues at this time."

Since the issue of entitlement to Rule 60(b) relief was never presented to, addressed or ruled on by the district court prior to the first appeal, the initial motions panel decision in this case can constitute only dicta or an advisory opinion which is not entitled to precedential weight under the law of the case doctrine. Additionally, the

subsequent September 13, 1993, decision of a second panel of the Ninth Circuit implied that because a petition for rehearing and suggestion for rehearing en banc were denied and rejected following the initial motions panel ruling, that somehow that fact contributes to a conclusion of finality and sanction of the first motions panel decision. See memorandum opinion of September 13, 1993, p.4, Appendix D. This is clearly an erroneous and dangerous proposition, as was noted by the Eleventh Circuit in *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir.1991):

> "We cannot conclude that the applicability of abstention was implicitly decided in the prior proceedings in this case before this court. In our view, a summary denial of rehearing en banc is insufficient to confer any implication or inference regarding the court's opinion relative to the merits of a case. The mere presence of an abstention argument raised in dissent in *Luckey II* is simply not enough to imply a preclusive decision.
>
> We also believe that attaching precedential weight to a denial of rehearing en banc would be unmanageable. As the majority explained in *Luckey III*, if the denial of a petition for rehearing en banc established the law of the case, then any judge who disagreed with any part of the panel opinion on which a poll was requested would be constrained to vote in favor of en banc review. Any poll that resulted in the denial of a petition for rehearing en banc would place the authority of the entire court behind not only every express holding in the panel opinion, but behind every conceivable implied holding as well. There is nothing in *Luckey II* to indicate

> why the majority of this court was not persuaded to grant en banc review, and any attempt to attribute any specific reasoning to a member of that majority is purely speculative. The dearth of stated reasons for the denial of en banc review underscores the risk of attributing any meaning to that decision within the context of the law of the case. We are convinced that such a practice would be untenable in light of the extraordinary nature of en banc review by this court. *See Luckey III,* 918 F.2d at 893-94.
>
> Accordingly, we find no law of the case barrier to the district court's consideration of the abstention doctrine in deciding whether this case should be dismissed."

The denial of rehearing and rejection of rehearing en banc of the first motions panel decision cannot therefore be construed to give any sanction to the dicta holding of that panel.

C. THE DISTRICT COURT'S RULE 60(b) DECISION WAS BASED ON NEW EVIDENCE NEVER CONSIDERED BY THE FIRST MOTIONS PANEL AND HENCE FALLS WITHIN A RECOGNIZED EXCEPTION TO THE LAW OF THE CASE DOCTRINE

Part of the difficulty of this case is that the first panel decision made a ruling of law that the Mixons were not entitled to Rule 60(b) relief, but did so without any factual basis, let alone a full and complete factual record before it. This legal ruling is now being given preclusive, binding effect even though there was significant new factual evidence presented to the district court which that

court believed warranted Rule 60(b) relief. The second Ninth Circuit panel has simply chosen to ignore that evidence and to enforce a prior ruling of the first panel based on an entirely different factual record and in a circumstance where no Rule 60(b) motion had ever been filed, heard or adjudicated by the district court. As the district court itself correctly pointed out, it was not bound by the first panel's factual conclusions which were not based upon a complete record.

In addition, the second panel's ruling raises form over substance to an absurd degree and contrary to prior authority in the Ninth Circuit and elsewhere. For example, in *United States v. Houser*, 804 F.2d 565, 568-69 (9th Cir.1986), the Ninth Circuit noted that a panel decision, particularly that of a motions panel, is subject to reexamination under the rule of the case doctrine:

> "We will exercise our discretion to reconsider a prior decision *if 'the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.' Moore*, 682 F.2d at 834 (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)). Where we have published a decision setting forth the reasons which guided us in resolving a legal issue in a certain way, we can more readily determine whether a proper showing has been made which would compel us to reconsider the question on the basis that the law has changed or that our decision was clearly erroneous. A summary disposition, without a reasoned analysis reflecting the authorities or arguments which led us to rule as we did, requires us to scrutinize the merits of

the question we were asked to reconsider with greater care.

. . . .

Reconsideration by a merits panel of a motion panel's decision, during the course of a single appeal, differs in a significant way from an appellate court's reconsideration of a decision on the merits issued by that court on a prior appeal. A party seeking to overturn a merits panel's decision obtained by its opponent has previously had the opportunity to file petitions for en banc review and certiorari challenging the earlier decision: the issue is presented to the appellate court for a second time only after the court's first decision has survived all of the customary obstacles to finality. Motions panel decisions are rarely subjected to a similar process prior to the time that the case is presented to the merits panel. Full review of a motions panel decision will more likely occur only after the merits panel has acted. For this reason, while a merits panel does not lightly overturn a decision made by a motions panel during the course of the same appeal, we do not apply the law of the case doctrine as strictly in that instance as we do when a second merits panel is asked to reconsider a decision reached by the first merits panel on an earlier appeal.

. . . .

Stated succinctly, the doctrine of 'law of the case' is inapplicable to the question of our jurisdiction to consider an appeal. *See Green v. Dep't of Commerce*, 618 F.2d 836, 839 n. 9 (D.C.Cir. 1980) (*'the doctrine of 'law of the case' does not apply to the fundamental question of subject matter jurisdiction'*). Based on the foregoing discussion,

> we next consider our jurisdiction to review the merits of this appeal." Emphasis added.

The rule of *Houser* that the presentation of new evidence or the existence of a clearly erroneous initial ruling that would work a manifest injustice does not command law of the case status is the rule in all other circuits as well. See e.g. *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir.1991):

> "The second jurisdictional question is whether the appeal is proper under section 1292(b). We are free to reexamine the motion panel's determination of that question unembarrassed by the law of the case doctrine or by the requirement that a panel opinion overruling a decision of this court be circulated in advance to all the judges in regular active service. 7th Cir.R. 40(f). Decisions by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission. *United States v. Houser*, 804 F.2d 565, 568 (9th Cir.1986). Certainly when the panel is merely deciding whether an appeal should be heard, rather than disposing of the appeal, its decision should be regarded as tentative, and therefore revisable by the merits panel."

See also *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir.1990); *Stewart-Warner Corp. v. City of Pontiac*, 767 F.2d 1563 (Fed.Cir.1985); *Religious Technology Center v. Scott*, 869 F.2d 1306 (9th Cir.1989); *Vicinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454 (9th Cir.1986); *Littman v. Massachusetts Mut. Life Ins. Co.*, 852 F.2d 1506 (11th Cir.1987); *Schexnider v. McDermott Intern, Inc.*, 868 F.2d 717 (5th Cir.1989); *In re: Progressive Farmers Ass'n*, 829

F.2d 651 (8th Cir.1987); *Miles v. Kohli & Kaliber Associates, Ltd.*, 917 F.2d 235 (6th Cir.1990); *Exxon Corp. v. United States*, 931 F.2d 874 (Fed.Cir.1991); *Luckey v. Miller*, 929 F.2d 618 (11th Cir.1991).

In this particular case, there had never been a Rule 60(b) motion addressing the issues concerning counsel's due diligence under the test established in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir.1983), prior to the first appeal in this case. Following the initial motions panel ruling, the Mixons merely exercised their right to properly and timely present such a motion to the district court. This was the first opportunity that the Mixons had to present such issues and support the same with evidence of the due diligence that had in fact been exercised by counsel for the Mixons in light of the fact that the district court had acted immediately and ex parte in its ruling on January 9, 1991, after recognizing the error committed by the clerk of the court. As noted by the Federal Circuit in *Exxon Corp. v. United States*, 931 F.2d 874, 878 (Fed.Cir.1991):

> "We hold that when a judgment has come before us for review, and certain findings of fact were not examined in, relied on or otherwise necessary to our decision in that appeal, law of the case does not prevent the trial court on remand from reexamining those findings, with no more deference than if the decision had never been appealed at all. Accordingly, even following our decisions in *Exxon I* and *Exxon II*, the Claims Court in this case remained free to amend its earlier finding of fact relating to the date of Essosa's insolvency."

Similarly, in this case, where new evidence was first capable of being presented to the district court on the Rule 60(b) motion, it was proper for the district court to consider that evidence and rule as it did despite the dicta pronouncement of the motions panel. To rule that the district court was precluded from considering Rule 60(b) relief based on new evidence is contrary to the mandates of the Federal Rules of Civil Procedure and would elevate any holding by a motions panel, even though dicta and a ruling made on the validity of a motion never presented to the trial court and without a full factual record, to the status of preclusive res judicata effect. Such a ruling has never been previously made by this court or any other and is clearly contrary to the law of the case doctrine itself.

CONCLUSION

Respectfully, the September 13, 1993, memorandum decision of the Ninth Circuit is totally erroneous, factually and legally, and if left to stand will send a clear message to litigants and the public that the courts will penalize civil rights litigants not on the basis of the strengths or weaknesses of their case, but rather on the error of a clerk of the court compounded by an inflexible enforcement of an appellate court ruling not based upon a full and complete record. Such a decision disserves this court, the litigants before it and the public at large.

Respectfully submitted this 14th day of January, 1994.

LYNN, SCOTT, HACKNEY & SULLIVAN

JOHN C. LYNN
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134 ORDER (Filed Jan 9, 1991)
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, and Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, and [sic] individual, Defendants.	Civil No. 88-3086

On October 31, 1990, the Court issued a judgment and memorandum decision in the above-entitled matter denying plaintiffs' motion under Rule 59(e), and granting defendant Farmers' motion for summary judgment. The Clerk's certificate of mailing attached to that decision indicates that a copy of the decision was sent to all

counsel except plaintiffs' counsel. The Court discovered this error of the Clerk's Office on January 9, 1991, and immediately contacted plaintiffs' counsel who confirmed that he had never received a copy of the decision and had no knowledge that the decision had been entered.

Under Fed.R.Civ.P. 60(a), this Court has the power to correct clerical mistakes in judgments. In addition, under Fed.R.App.P. 4 (a)(5), the District Court has the power upon a showing of good cause to extend the time for filing a notice of appeal. In accordance with the authority granted to this Court by these two rules, the Court shall order that the judgment and memorandum decision bearing the filing date of October 31, 1990, shall be deemed entered as to the plaintiffs as of January 10, 1991, for purposes of Federal Rules of Appellate Procedure 3 and 4. The Court makes this finding on the basis that a mistake was made in the Clerk's certificate of mailing and that the plaintiffs and their counsel never received a copy of the Court's decision and had no other knowledge of these decision. In addition, the Court finds that plaintiffs' counsel has proceeded diligently in all aspects of this case, and that good cause exists for correcting the mistake and extending the time for appeal.

Finding good cause therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED that pursuant to Fed.R.Civ.P. 60(a) and Fed.R.App.P. 4(a)(5), the judgment and memorandum decision of this Court bearing the filing date stamp of October 31, 1990, be, and the same are hereby deemed entered for purposes of

Federal Rules of Appellate Procedure 3 and 4 as of January 10, 1991, as to the plaintiffs.

DATED this 9th day of January, 1991.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY N. MIXON, et al., Plaintiffs-Appellants, vs. FARMERS INSURANCE COMPANY OF IDAHO, et al., Defendants-Appellees.	No. 91-35417 DC# CV-87-4134-MJC CV-88-3086-MJC Idaho (Boise) ORDER (Filed Jul. 17, 1991)

Before: WALLACE, Chief Judge, KOZINSKI and TROTT, Circuit Judges

Appellee Farmers Insurance Company of Idaho ("FIC") has filed a motion to dismiss this appeal, contending the district court's order granting summary judgment in favor of FIC is a nonfinal order. Appellees Gunnell and Schvaneveldt and appellees Jones, Haws, Olmstead, Birch, and Idaho Department of Law Enforcement have filed motions to dismiss this appeal on the ground appellants' notice of appeal is untimely. This court has reviewed appellees' motions, appellants' oppositions thereto, and this court's records.

In regard to appellee FIC, court records indicate that although FIC has been dismissed, appellants' claims against other parties remain pending. Thus, the order granting summary judgment in favor of FIC is a nonfinal nonappealable order. *See Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985). Because the district court has not granted appellants' motion for

Fed. R. Civ. P. 54(b) certification, FIC's motion to dismiss is granted.

As to appellees Gunnell and Schvaneveldt and appellees Jones, Haws, Olmstead, Birch, and Idaho Department of Law Enforcement, the record shows that appellants failed to file a motion to extend the time for appeal within either the thirty-day period following the district court's October 31, 1990 order or the subsequent thirty-day period. Therefore, appellants were not entitled to an extension under Fed. R. App. P. 4(a)(5). *See Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) (per curiam).

Also, the district court improperly relied on Fed. R. Civ. P. 60(a) to grant relief. Rule 60(a) was not designed to correct the type of error that occurred in this case. *See Waggoner v. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam). Accordingly, appellants were not entitled to relief under Rule 60(a).

Finally, the evidence does not support the district court's finding that appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' Sept. 5, 1990 motion to amend judgment. Thus, under the test set forth in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), appellants were not entitled to relief under Rule 60(b). Therefore, the motions to dismiss filed by Gunnell and Schvaneveldt and Jones, Haws, Olmstead, Birch, and Idaho Department of Law Enforcement are also granted.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs,

-vs-

FRANKLIN COUNTY, STATE OF IDAHO, et al.,

Defendants.

Civil No. 87-4134

MEMORANDUM DECISION

(Filed Dec. 23, 1991)

JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife,

Plaintiffs,

-vs-

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants.

Civil No. 88-3086

The Court has before it a motion for relief from judgment brought under Fed.R.Civ.P. 60(b)(1) filed by the plaintiffs. The Court heard oral argument on December 17, 1991, and the motion is now at issue. The Court will review the history of this litigation before resolving the motion.

The plaintiffs, Dr. Jerry Mixon and his wife, Marilyn, filed two cases – since consolidated – alleging that their civil rights were violated when various government officials and private individuals conspired to revoke Dr. Mixon's hospital privileges and charge him with the crime of arson. Dr. Mixon sued numerous defendants including state and county governments, law enforcement and prosecutorial officials, a city hospital, certain members of the hospital's board of trustees, the hospital's administrator, and a member of the hospital's medical staff. Additional defendants included Farmers Insurance Company of Idaho; TWI, Inc.; and Robert Mangini, an arson investigator.

Some of these defendants filed motions for summary judgment which were granted on January 19, 1990. A copy of the Court's memorandum decision and judgment was mailed to all counsel.

On January 29, 1990, Dr. Mixon filed a motion to reconsider the grant of summary judgment, and a motion to certify the decisions as final to permit an appeal. On August 27, 1990, the Court denied the motion for reconsideration and granted the motion to certify. A copy of this order was sent to all counsel.

Dr. Mixon then filed a motion to amend pursuant to Fed.R.Civ.P. 59(e) on September 5, 1990, in an attempt to persuade the Court to look at new evidence. Sometime thereafter, the case was reassigned to newly-appointed Judge Edward J. Lodge. Judge Lodge proceeded to rule on a few housekeeping motions, and then later reassigned the case to this Court on October 18, 1990.

About thirteen days later with no advance notice to counsel or oral argument, the Court entered a memorandum decision and judgment denying the plaintiffs' motion to amend. Unfortunately, the Clerk of the Court neglected to send a copy of the Court's decision denying the motion to amend to counsel for the plaintiffs. Consequently, the plaintiffs had no knowledge that the Court had rendered a decision.

Fifty-four days later, on December 24, 1990, plaintiffs' counsel called this Court's chambers inquiring about the status of the motion to amend. He talked to a law clerk who was unfamiliar with the case and was therefore unable to get any information about the motion to amend. The law clerk who was familiar with the case was on vacation and returned around January 9, 1991. Upon discovering that the Clerk's certificate of mailing did not list plaintiffs' counsel, this law clerk called plaintiffs' counsel and told him that the decision had been entered but never mailed to him. On the same day, this Court entered an order based on Fed.R.Civ.P. 60(a) and Fed.R.App.P. 4(a)(5) extending the time for filing a notice of appeal. There was no oral argument or briefing submitted prior to the issuance of this order; the Court issued the order sua sponte.

The plaintiffs then pursued their appeal to the Ninth Circuit. The defendants responded with a motion to dismiss, asserting that Fed.R.Civ.P. 60(a) did not apply to this situation. In addition, defense counsel argued that Rule 60(b) was inapplicable. Plaintiffs' counsel responded that Rule 60(b) did apply and should permit an extension

of the time to appeal. Both sides filed affidavits explaining this Court's motion practice and the factual circumstances surrounding the motion to amend.

The Circuit Court granted the motion to dismiss, finding that this Court's reliance on Rule 60(a) was misplaced because that rule was not designed to correct mistakes of the type that occurred here. The Ninth Circuit then went on to state:

> Finally, the evidence does not support *the district court's finding* that the appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' September 5, 1990, motion to amend judgment. Thus, under the test set forth in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), appellants were not entitled to relief under Rule 60(b). Therefore, the motions to dismiss filed by Gunnell and Schvaneveldt and Jones, Haws, Olmstead, Birch, and the Idaho Department of Law Enforcement are also granted.

Mixon v. Farmers No. 91-35417, slip op. at 2 (9th Cir. July 17, 1991) (emphasis added).

The Ninth Circuit appears to have labored under the mistaken assumption – fostered undoubtedly by certain language in this Court's opinion – that the order of January 9, 1991, was based in part on Rule 60(b). It was not. This Court did not cite or rely upon Rule 60(b) in that order of January 9, 1991. The Court does see, however, that its own unfortunate choice of language led the Ninth Circuit astray on this point. In this Court's order, the Court cited to Rule 60(a) and then stated that

> the Court finds that plaintiffs' counsel has proceeded *diligently* in all aspects of this case. . . .

Order of January 9, 1991, at p.2 (emphasis added).

The Circuit Court understandably felt that this Court was making a crucial finding for *Rule 60(b)* purposes under the test enunciated in *Rodgers v. Watt, supra:* That plaintiffs' counsel acted with due diligence to ascertain whether the Court had issued an order on his pending motion. But this Court made no such finding. This Court did not cite or discuss the *Rodgers* opinion or Rule 60(b). The Court had no motion, briefing, or affidavits before it when it made its ruling. The order was based solely on Rule 60(a). It is mere happenstance that the Court's use of the word "diligently" coincides with the "due diligence" standard of *Rodgers:* The Court meant that plaintiffs' counsel had never missed deadlines or been dilatory in the past, not that plaintiffs' counsel had used due diligence in checking on the status of the motion to amend. The Court does recognize that its choice of language was unfortunate and has led to this misunderstanding. The bottom line, however, is that the order of January 9, 1991, was not based on Rule 60(b) in any way.

Defense counsel nevertheless argues that many of the affidavits submitted by the plaintiffs in this Court are identical to those submitted to the Circuit, and thus should not be considered. But these affidavits have never been examined by this Court. This Court has never decided whether plaintiffs' counsel exercised the due diligence required by Rule 60(b). A finding of due diligence is factual in nature and is left to the sound discretion of the trial court. *Rodgers v. Watt, supra.* Defense counsel

offers no authority holding that the Circuit would have original – as opposed to appellate – jurisdiction to consider a Rule 60(b) motion. In fact, the law is directly opposite. *See Pollard v. Supreme Court for State of Michigan*, 334 F.2d 129 (6th Cir. 1964) (Court of Appeals' jurisdiction is appellate in nature and does not include original action for writ of mandate.); *United States v. Apex Distributing Co.*, 270 F.2d 747, 749 (9th Cir. 1959) (Federal courts have appellate jurisdiction only to the extent conferred by statute.). In this case, the statutes conferring appellate jurisdiction are 28 U.S.C. §§ 1291, 1292. These statutes do not grant the Circuit original jurisdiction to rule on a 60(b) motion.

Because this Court has not resolved the due diligence issue, and because it appears that such a factual issue cannot be resolved in the first instance by the Circuit, the Court finds that it must make a ruling on whether plaintiffs' counsel used due diligence to check on his pending motion to amend. This decision is not affected by the law of the case doctrine. That doctrine prevents reconsideration of issues already resolved. *Milgard Tempering, Inc. v. Selas Corporation of America*, 902 F.2d 703, 715 (9th Cir. 1990). This issue is not being "reconsidered"; rather, it is being "considered" for the first time at the trial level.

Turning now to the merits of the Rule 60(b) motion, the Court finds that the applicable standard is set forth in the Ninth Circuit by *Rodgers v. Watt, supra.* The only element that is in real dispute is the requirement that plaintiffs' counsel act with due diligence to inquire about the status of his motion. In *Rodgers* itself, the Circuit found that an attorney acted with diligence when he sent his secretary to the clerk's office every thirty days or so to

check on the status of a pending motion. Here, plaintiffs' counsel waited about another twenty-four days – a total of fifty-four days – to check on his case. During this time there were four motions to dismiss and motions for summary judgment pending in this large and very complex case. Plaintiffs' counsel had no reason to suspect an expedited resolution of his motion to amend since it took the Court a number of months to rule on the immediately preceding motion to reconsider.[1] Plaintiffs' counsel could have made further phone calls on December 24th to track down the motion's status, but his failure to do so was excusable in that he was given no clue by the law clerk he talked to that a decision had been entered, and further because it was Christmas Eve, a time when our hearts turn toward the hearth, not the file drawer.

Given the complexity of this case, the numerous pending motions, the fact that plaintiffs' counsel did inquire within fifty-four days of the decision, and the delay in prior rulings, the Court finds that plaintiffs' counsel did act with due diligence in inquiring about the status of his motion. The Court will therefore grant the plaintiffs relief from the filing date of the judgment of October 31, 1990, and provide that the filing date of that

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[1] Plaintiffs filed their motion to amend on September 5, 1990. Statistics available in the district court Clerk's Office show that the average time from filing to disposition of non-dispositive motions is 110 days. Plaintiffs' motion to amend was decided in fifty-six days, about one-half the normal time.

judgment for purposes of appeal shall be the filing date of this order.

DATED this 23rd day of December, 1991.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134 ORDER (Filed Dec. 23, 1991) Civil No. 88-3086
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual, Defendants.	

The Court has examined the entire record concerning the motion for relief from judgment filed pursuant to Rule 60(b)(1) by the plaintiffs. In accordance with the views expressed in the memorandum decision accompanying this order,

NOW, THEREFORE, IT IS HEREBY ORDERED that the plaintiffs' motion for relief from judgment pursuant to Rule 60(b)(1) be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the plaintiffs have relief from the filing date of the judgment of October 31, 1990, and that the filing date of that judgment for purposes of appeal shall be the filing date of this order.

DATED this 23rd day of December, 1991.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

D1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, v. FRANKLIN COUNTY, et al., Defendants, and EUDEAN GUNNELL, individually and in his capacity as Franklin County Sheriff; GARY SCHVANEVELDT, individually and in his capacity as Franklin County Deputy Sheriff; JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT, Defendants-Appellees.	)	No. 92-35065 D.C. No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation,

Defendant,

and

TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants-Appellees.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their

No. 92-35119

D.C. No. CV 87-4134

capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT,

Defendants-Appellants.

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

EUDEAN GUNNELL, individually and in his official capacity as Franklin County Sheriff, GARY SCHVANEVELDT, individually and in his official capacity as Franklin County Deputy Sheriff,

Defendants-Appellants.

No. 92-35122

D.C. No. CV 87-4134-MJC

MEMORANDUM

(Filed Sept. 3, 1993)

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,	)	
Plaintiffs,	)	D.C. No. CV 88-3086-MJC
v.	)	Lead No. CV 87-4134-MJC
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,	)	
Defendants.	)	

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, Chief Judge, Presiding

Argued and submitted June 7, 1993
Seattle, Washington
Filed September 3, 1993
Before: BRUNETTI, LEAVY and TROTT, Circuit Judges.

On January 9, 1991, the district court entered an Order to deem the judgment of October 31, 1990, entered effective "January 10, 1991, for purposes of Federal Rules of Appellate Procedure 3 and 4." Nevertheless, a motions panel of this court granted a motion to dismiss the pending appeal, concluding in its order of July 15, 1991 as follows:

> Finally, the evidence does not support the district court's finding that appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' September 5, 1990 motion to amend judgment.

> Thus . . . appellants were not entitled to relief under Rule 60(b).

A petition for rehearing and suggestion for rehearing *en banc* was filed addressing in part the applicability of Rule 60(b) to the facts of the instant case. On September 12, 1991, the petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected.

Despite the motion panel's decision, the Mixons returned to district court and filed a motion for relief pursuant to Rule 60(b), in which they sought an extension of the time to appeal. On December 23, 1991, the district court granted the Mixons' Rule 60(b) motion, and the Mixons were given additional time to file an appeal.

The decision of an appellate court on a legal issue " 'must be followed in all subsequent proceedings in the same case.' " *Maag v. Wessler*, No. 92-36657, slip op. 5343, 5348 n.2 (9th Cir. May 24, 1993) (quoting *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985)) (internal quotations omitted). The motions panel held that under Rule 60(b), the Mixons were not entitled to relief and that their appeal was untimely. In *Hanna Boys Center v. Miller*, 853 F.2d 682 (9th Cir. 1988), this Court ruled that an order of a motions panel vacating an order previously entered by the district court was the law of the case. *Id.* at 685-86. The motions panel in the present case ruled on the Rule 60(b) motion and determined that the Mixons' appeal was untimely. The Mixons had specifically asserted to the motions panel that in rendering a determination with respect to Rule 60(b), the motions panel was overstepping its bounds and was usurping the authority of the district

court. The motions panel rejected this claim. Thus, this ruling became the law of the case.

The test to determine whether a district or appellate court may revisit a prior decision by an appellate court is whether, subsequent to that decision, the Supreme Court has spoken on the issue, a legislative act has been taken, or if there has been an *en banc* decision affecting the prior order. *Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984). None of the above occurred in the case at bar. Therefore, because the motions panel had ruled on the applicability of Rule 60(b), the district court was obligated to follow the law of the case and could not thereafter rule differently, as it did on Mixons' Rule 60(b) motion.

In case No. 92-35119, the defendants, in their amended notice of cross appeal, state that they "appeal from that portion of the Memorandum Decisions and Order of the Honorable Marion J. Callister filed January 19, 1990, wherein the court failed to dismiss the action against these defendants as to State tort cause of action." Those parties failed to raise the issue in their brief, so we deem it abandoned.

In appeal Nos. 92-35119 and 92-35122, the district court's order granting Rule 60(b) relief is REVERSED and appeal No. 92-35065 is DISMISSED.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, v. FRANKLIN COUNTY, et al., Defendants, and EUDEAN GUNNELL, individually and in his capacity as Franklin County Sheriff; GARY SCHVANEVELDT, individually and in his capacity as Franklin County Deputy Sheriff; JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT, Defendants-Appellees.	No. 92-35065 D.C. No. CV 87-4134-MJC ORDER (Filed Oct. 20, 1993)

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation,

Defendant,

and

TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants-Appellees.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their

No. 92-35119

D.C. No. CV 87-4134

capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT,

Defendants-Appellants.

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

EUDEAN GUNNELL, individually and in his official capacity as Franklin County Sheriff, GARY SCHVANEVELDT, individually and in his official capacity as Franklin County Deputy Sheriff,

Defendants-Appellants.

No. 92-35122
D.C. No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,	)	
Plaintiffs,	)	D.C. No. CV 88-3086-MJC
v.	)	Lead No. CV 87-4134-MJC
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,	)	
Defendants.	)	

Before: BRUNETTI, LEAVY and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.